FILED ELECTRONICALLY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Dr. PAUL SELINGER and MARSHA SELINGER,

Plaintiffs,

- against -

THE CITY OF NEW YORK; ROBERT MORGENTHAU, as District Attorney of New York; KATHRYN QUINN, in herindividual and official capacity as Assistant District Attorney, DETECTIVES and/or POLICE OFFICERS JOHN/JANE DOES 1-10, in their individual and official capacities,

Defendants.

08 CV 2096 (RMB) (GWG)

ECF CASE

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT ROBERT M. MORGENTHAU'S MOTION TO STAY DISCOVERY

Defendant Robert M. Morgenthau, District Attorney for New York County (DA Morgenthau) submits this Memorandum of Law in support of his motion pursuant to Federal Rule of Civil Procedure 26(c) for an order staying discovery in the above-referenced action.

INTRODUCTION

In his Amended Complaint (Docket Sheet Entry No. 17),[1] plaintiff advances claims for money damages against DA Morgenthau under 42 U.S.C. § 1983, asserting that DA Morgenthau is liable in his official and individual capacities for false arrest, abuse of process and malicious prosecution, defamation, state law negligence, and loss of consortium. These allegations stem

[1] On August 4, 2008, DA Morgenthau received, via postal mail, a copy of plaintiff's Amended Complaint, dated and postmarked August 1, 2008. Because the Amended Complaint was not filed electronically, it was not available on the Electronic Case Filing system as of the filing of this motion on August 5, 2008.

from plaintiff's arrest and prosecution under New York County Indictment No. 2759/2005. Because plaintiff's claims are foreclosed by the defense of absolute prosecutorial immunity or are otherwise facially deficient, discovery in this matter should be stayed pending the filing and resolution of DA Morgenthau's motion to dismiss.

THE ALLEGATIONS OF THE COMPLAINT

According to the complaint, plaintiff is a licensed medical doctor who owns and operates his own dental practice in New York (Am. Compl. ¶ 20). During the period at issue in the complaint, plaintiff provided dental services for Omni Medical Care and the Omni Medical Clinic (Am. Compl. ¶ 21).

In August of 2004, an undercover New York City police officer visited plaintiff's office as part of an investigation into the billing practices of several physicians and medical care facilities, including Omni Medical Care (Am. Compl. ¶¶ 30, 33). Plaintiff examined the undercover officer and prescribed treatment for his complaints (Am. Compl. ¶¶ 34-38). Following this visit, Assistant District Attorney Kathryn Quinn presented evidence to a grand jury concerning the fraudulent billing practices of Omni Medical Care, including plaintiff's association with the group (Am. Compl. ¶¶ 61-68). According to plaintiff, ADA Quinn presented confusing and incomplete evidence to the grand jury concerning plaintiff's involvement with Omni Medical Care, and additionally concealed evidence that would have exculpated plaintiff (Am. Compl. ¶¶ 73, 75-88). The grand jury subsequently indicted plaintiff and a number of other doctors and health care providers for insurance fraud (Am. Compl. ¶¶ 76, 78, 98). According to plaintiff, police officers later arrested him in connection with the insurance scheme, after "conferring" with DA Morgenthau (Am. Compl. ¶ 62, 100). In plaintiff's view, this arrest was false and malicious (Am. Compl. ¶¶ 62, 100)

Between 2005 and 2006, DA Morgenthau and other named defendants held press conferences in which they made public statements about the prosecution (Am. Compl. ¶¶ 91-94). According to defendant, DA Morgenthau's public statements about the case included defamatory references to plaintiff's involvement in the insurance scheme (Am. Compl. ¶¶ 91-95). On March 1, 2007, the Honorable Roger S. Hayes dismissed the indictment against plaintiff as supported by insufficient evidence (Am. Compl. ¶¶ 123-128).

According to plaintiff, DA Morgenthau and the other named defendants "wrongly arrested, wrongfully imprisoned, wrongfully detained, and maliciously prosecuted" him based on "false and uncorroborated accusations and evidence" (Am. Compl. ¶¶ 119-121). Plaintiff alleges that as a result of his arrest and prosecution, he suffered both monetary loss and damage to his professional and social standing (Am. Compl. ¶¶ 102-105). Plaintiff additionally alleges that his wife, also a plaintiff in this action, suffered similar financial loss as a result of the DA Morgenthau's wrongful actions (Am. Compl. ¶¶ 111-113). Further, Mrs. Selinger was deprived of plaintiff's emotional support and suffered impairment of her marital relations with plaintiff (Am. Compl. ¶¶ 113-114).

PROCEDURAL BACKGROUND

In his original complaint, plaintiff sought to hold "all defendants,"[2] including, presumably, DA Morgenthau, liable under 42 U.S.C. § 1983 for false arrest, abuse of process, malicious prosecution, and defamation (Complaint ¶¶ 131-140). Plaintiff also advanced state law claims against DA Morgenthau for malicious prosecution, abuse of process, and negligence

[2] In a letter dated March 20, 2008, Assistant District Attorney Michael S. Morgan notified plaintiff that because Kathyrn Quinn was no longer an employee of the New York County District Attorney, no employee of the New York County District Attorney's Office was authorized to accept service on her behalf. As was pointed out at the parties' conference before the Honorable Judge Berman on July 18, 2008, plaintiff has not effected service of process on Kathryn Quinn within the time prescribed by N. Y. Civ. Prac. Law & R. § 306-b. Accordingly, she is not a party to this action.

(Am. Compl. ¶¶ 157-67, 171-185, 189-204).

On April 23, 2008, Assistant District Attorney Michael S. Morgan submitted a letter notifying the Honorable Judge Berman of DA Morgenthau's intention to file a motion to dismiss the complaint, and requesting a pre-motion conference in accordance with Judge Berman's Individual Court Rule 2(A) (Docket Sheet Entry No. 6). In an endorsement order appended to that letter and dated April 24, 2008, Judge Berman directed plaintiff to inform the court by April 28, 2008 whether he wished to amend his complaint prior to the filing of DA Morgenthau's motion. Plaintiff did not respond to the court's request.

At a conference before Judge Berman on July 17, 2008, DA Morgenthau again voiced his intention to file a dismissal motion and pointed out plaintiff's failure to respond to the April 24, 2008 endorsement order. Judge Berman extended plaintiff's time to file amended pleadings to July 31, 2008 (Docket Sheet Entry No. 12). Judge Berman further ordered that following that date, DA Morgenthau would be required submit a letter stating again his intention to move to dismiss the complaint, but set no schedule for the motion itself, indicating instead that he preferred to have the defendants file a joint motion to dismiss. He left in place a Proposed Case Management plan that required submission of initial disclosures required by Rule 26(a) by July 31, 2008, and ordered that all discovery be completed by November 17, 2008 (Docket Sheet Entry No. 12).

In a letter to Magistrate Judge Gabriel W. Gorenstein dated July 23, 2008, DA Morgenthau requested permission to move to stay discovery pending the filing and resolution of his motion to dismiss. In an order dated July 29, 2008, Magistrate Gorenstein directed DA Morgenthau to make a formal motion to stay discovery, but stayed initial discovery as to DA Morgenthau pending resolution of that motion (Docket Sheet Entry No. 16).

On August 1, 2008, one day after the deadline set by Judge Berman had expired, plaintiff filed an amended complaint in this matter (Docket Sheet Entry No. 17), substantially reiterating his previous allegations. By a letter dated August 5, 2008, DA Morgenthau renewed his request for permission to file a motion to dismiss all claims as against DA Morgenthau.

ARGUMENT

Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, the Court has the authority to stay discovery against any party "for good cause shown." Good cause may be found where "a party has filed a dispositive motion, the stay is for a short period of time, and the opposing party will not be prejudiced by the stay." Spencer Trask Software & Information Servs., LLC v. Rpost Intn'l Ltd., 206 F.R.D. 367, 368 (S.D.N.Y. 2002). In assessing a motion to stay discovery, a court should consider both the strength of the dispositive motion that is the basis for the stay and the breadth and burden of discovery anticipated in the particular case. See id. at 368; Johnson v. New York Univ. Sch. of Educ., 205 F.R.D. 433, 434 (S.D.N.Y. 2002). As the Supreme Court has explained, a defendant's dispositive motion asserting the defense of absolute immunity presents a particularly strong ground for staying discovery, as the immunity doctrine affords "not just protection from liability, but also the right not to have to answer for one's actions at all." Miller v. Gammie, 292 F.3d 982, 987 (9th Cir. 2002) (citing Mitchell v. Forsyth, 472 U.S. 511 (1985)). Accordingly, "[a] litigant is [ ] entitled to a ruling on a motion to dismiss on the pleadings based on official immunity before the commencement of discovery." Id. (emphasis added). See also Siegert v. Gilley, 500 U.S. 226, 231 (1991).

As a threshold matter, the schedule in place for DA Morgenthau's proposed motion to dismiss assures that any stay issued in this case will be of minimal length. By a letter dated August 5, 2008, DA Morgenthau renewed his request to file a dismissal motion pursuant to

Federal Rule of Civil Procedure 12(b)(6), and is poised to proceed with that motion swiftly. Presuming no further delays in the process,[3] discovery as to DA Morgenthau will be stayed only for the short period necessary to resolve that motion.

More importantly, however, discovery should be stayed because DA Morgenthau's dismissal motion rests on an exceptionally strong basis. First, DA Morgenthau opposes the claims raised against him in his official capacity as a public prosecutor as barred by 11th Amendment immunity. It is well established that "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office"; accordingly, "neither a State nor its officials acting in their official capacities are 'persons'" under 42 U.S.C. § 1983. Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989). Thus, any suit seeking monetary damages against DA Morgenthau in his official capacity as a public prosecutor is facially deficient. See Gan v. City of New York, 996 F.2d 522, 529, 536 (2d Cir. 1993); Boddie v. Morgenthau, 342 F.Supp.2d 193, 207 (S.D.N.Y. 2004).

Plaintiff's claims against DA Morgenthau in his individual capacity similarly fail. Plaintiff's stated claims for abuse of process and malicious prosecution are predicated on events that allegedly took place during the prosecution of plaintiff on criminal charges. As the Supreme Court has concluded, "a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution" enjoys absolute immunity from a suit for damages under § 1983. Imbler v. Pachtman, 424 U.S. 409-410 (1976). See also Shmeuli v. City of New York, 424 F.3d 231, 236-239 (2d Cir. 2005). Moreover, absolute prosecutorial immunity applies with equal force to allegations of malicious prosecution brought under state law. See

[3] It is of note that plaintiff failed to respond to Judge Berman's initial direction, issued in the Endorsement Order appended to ADA Michael S. Morgan's April 23rd pre-motion conference letter, to respond by April 28, 2008 regarding whether he wished to amend his complaint prior to the filing of DA Morgenthau's motion. Thus, any cumulative delay is, at least in part, a result of plaintiff's own actions.

Shmueli, 424 F.3d at 238. See also Arteaga v. State, 72 N.Y.2d 212, 217 n.1 (1988); Drakeford v. City of New York, 6 A.D.3d 302 (1st Dept. 2004). Thus, plaintiff's state and federal claims against DA Morgenthau for abuse of process and malicious prosecution in his individual capacity are unquestionably barred by prosecutorial immunity.

Plaintiff's remaining claims are also facially insufficient. First, as plaintiff's complaint does not allege that DA Morgenthau personally assisted in effecting his arrest, plaintiff's § 1983 claim for false arrest must fail. It is beyond question that "personal involvement of defendant in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983." Farrell v. Burke, 449 F.3d 470 (2d Cir. 2006) (internal quotes and citations omitted). Defendant's § 1983 claim for defamation must also fail, as the Constitution does not protect an individual's reputation, and therefore no defamation action lies under § 1983. See Siegert v. Gilley, 500 U.S. 226, 233 (1991); Paul v. Davis, 424 U.S. 693, 701 (1976); Valmonte v. Bane, 18 F.3d 992, 1001 (2d Cir. 1994).

Similarly, plaintiff's state law negligence claim against DA Morgenthau fails because New York law does not recognize a negligence cause of action arising from a criminal investigation or prosecution. See Johnson v. Kings County District Attorney's Office, 308 A.D.2d 278, 284-285 (2d Dept. 2003). See also Bernard v. United States, 25 F.3d 98, 102 (2d Cir. 1994) (discussing New York law). Finally, because plaintiff's claims against DA Morgenthau all fail, it necessarily follows that plaintiff's wife has no derivative claim against DA Morgenthau for loss of consortium or the like. See Hazel v. Montefiore Med. Ctr., 243 A.D.2d 344, 345 (1st Dept. 1997). See also Wahhab v. City of New York, 386 F.Supp.2d 277, 292 (S.D.N.Y. 2005) ("§ 1983 does not support derivative claims for loss of consortium"). Because DA Morgenthau's arguments in favor of dismissal have substantial merit and rest on well-recognized authority, a stay of discovery is well warranted.

Additionally, discovery in this case is likely to prove burdensome to DA Morgenthau and his office. Plaintiff was one of sixteen defendants named in a multi-count indictment, under which three defendants have yet to be sentenced. Most critically, the file in this case occupies more than fifty file boxes. Plainly, the process of sorting through the documents pertaining to this case to identify those relevant to plaintiff's claims will be burdensome to an office otherwise occupied with a substantial number of pressing criminal matters. When weighed against the strength of DA Morgenthau's arguments for dismissal, the burdensome nature of discovery in this case strongly recommends a stay pending resolution of DA Morgenthau's potentially dispositive motion. See Johnson v. New York Univ. School of Educ., 205 F.R.D. 433, 434 (S.D.N.Y. 2002) (granting defendant's motion for a stay where "adjudication of the pending motion to dismiss may obviate the need for burdensome discovery").

Finally, plaintiff can point to no prejudice that he will suffer as a result of a strictly limited stay of discovery. Although plaintiff's July 25, 2008 response to DA Morgenthau's pre-motion letter argues that resolution of DA Morgenthau's dismissal motion "depends largely upon many facts and/or issues of fact that have yet to be addressed during discovery" (Letter at 3), he cannot support that claim. Indeed, in advancing that argument, plaintiff relies on a line of cases concerning qualified immunity. A stay of discovery is inappropriate in such cases because a qualified immunity defense requires the court to consider a defendant's actions in light of the information available to him at the time of an alleged violation, and his subjective motivations. See, e.g. Harlow v. Fitzgerald, 457 U.S. 800, 815-816 (1982) (explaining the "subjective" and "objective" aspects of a qualified immunity claim). DA Morgenthau's motion to dismiss on the ground of absolute prosecutorial immunity, in contrast, may be resolved on the pleadings and the law, without further inquiry into the subtleties of subjective motivation or individual knowledge. Accordingly, preliminary discovery is not a prerequisite to the adjudication of that motion, and plaintiff can claim no prejudice from a short stay pending its resolution.

CONCLUSION

This Court should stay discovery as to DA Morgenthau in the current action pending resolution of his motion to dismiss all charges against him pursuant to Federal Rule of Civil Procedure 12(b)(6).

Dated: New York, NY
August 5, 2008

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